**Bridgeport Ambulance Service, Inc. *and* Linda L. Sutphin *and* Ricardo Alcover.** Cases 34–CA–4430 and 34–CA–4471

March 29, 1991

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On September 13, 1990, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed exceptions and a supporting brief, and both filed answering briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions, and to adopt the judge's recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bridgeport Ambulance Service, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent also filed a motion to strike the General Counsel's brief in support of exceptions. The Respondent contends that the brief should be rejected because it fails to comply with Sec. 102.46(c) of the Board's Rules and Regulations in that it does not indicate by citation the specific exceptions to which particular portions of the brief relate. Although the General Counsel's brief does not comply in all particulars with Sec. 102.46(c), it is not so deficient as to warrant striking. Moreover, the Respondent has not shown prejudice as a result of any deficiency. In light of all the circumstances, the Respondent's motion is denied. See *Farley Candy Co.*, 300 NLRB 849 (1990).

[2] We affirm the judge's determination as to the relevancy of testimony concerning employee sentiments about the Union prior to the April 18, 1989 walkout. The issue before the judge was the motivation for the employees' walkout, and the judge's ruling did not prevent the Respondent from eliciting testimony on that issue. In any event, the termination of employee Leill was the primary precipitating factor in the walkout, and evidence of generalized dissatisfaction with the Union would not establish that the employees' actions were unprotected.

[3] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Jaye Bailey, Esq.*, for the General Counsel.
*Gary S. Starr, Esq.* and *Kenneth R. Plumb, Esq. (Siegel, O'Connor, Schiff, Zangari & Kainen, P.C.)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 2 and 3, 1990, in Hartford, Connecticut. The consolidated complaint herein issued on October 31, 1989,[1] and was based upon an unfair labor practice charge in Case 34–CA–4430 filed on September 6 by Linda Sutphin, an individual, and an unfair labor practice charge in Case 34–CA–4471 filed on October 17, 1989, by Ricardo Alcover, an individual. The consolidated complaint alleges that on about April 18 certain of the employees of Bridgeport Ambulance Service, Inc. (Respondent) ceased work concertedly and engaged in a strike, and that on April 18, Respondent, by Joseph Lansing, its president, threatened certain of its employees with discharge unless they ceased this activity. The consolidated complaint further alleges that on April 18 Respondent discharged Sutphin and Alcover because they engaged in this protected concerted activity, all in violation of Section 8(a)(1) of the Act. Respondent admits that Lansing is its president, as well as supervisor and agent, and that on April 18 certain of its employees ceased working, but denies that this stoppage constituted protected concerted activity. Respondent further admits that it advised certain of its employees that if they failed to work, they would be discharged and that Respondent did thereafter discharge Sutphin and Alcover, but subsequently offered them the opportunity to return to work. While making these admissions, Respondent, of course, denies that they constitute a violation of the Act. Upon the entire record, including the briefs received from the parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a Connecticut corporation with its principal office located in Bridgeport, Connecticut (the facility), is engaged in the business of providing ambulance, limousine, and medical delivery services. During the 12-month period ending September 30, Respondent, in the course and conduct of its business operations, derived gross revenue in excess of $500,000 and, during the same period, provided services valued in excess of $50,000 to the city of Bridgeport, which is directly engaged in commerce, and, again during the same period, purchased and received at its facility goods and materials valued in excess of $5000 directly from points outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE FACTS

In May 1988, after a Board-conducted election, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 191, AFL–CIO (the Union) was certified as the exclusive representative of Respondent's emergency medical technicians (EMTs), paramedics, nonemergency drivers, dispatchers, and other nonsupervisory employees. Since that time, the parties have been negotiating, but have been unsuccessful in attempting to

[1] Unless indicated otherwise, all dates referred to herein relate to the year 1989.

reach an agreement. The two alleged discriminatees were within this unit: Sutphin was an EMT employee who, with a partner, responded to emergency calls in one of Respondent's vehicles, while Alcover was a nonemergency driver, who transported the disabled for dialysis or other treatment, utilizing one of Respondent's vehicles especially designed for the disabled. These calls were arranged and scheduled in advance by Respondent.

Respondent has a number of defenses to the allegation that Sutphin and Alcover were unlawfully discharged. Principal among them is that, although their activity was concerted, it was not protected because it went against the Union's wishes and represented a wildcat strike. In the alternative, Respondent argues, Sutphin had refused to respond to an emergency call (which, itself, is grounds for termination) and Alcover was ''stealing time,'' also grounds for termination, and that is why they were not reinstated at the conclusion of the walkout.

### A. *Events of April 17* [2]

The work stoppages of April 17 and 18 were precipitated by the suspension and subsequent termination of Kurt Leill (apparently, misspelled in the transcript as Lyle), who had been employed by Respondent as a paramedic. Sutphin testified that she spoke to Leill at about noon on April 17 in the crew's quarters (where the employees stay at the facility between calls). Also present during this conversation were about four other employees, including Sutphin's partner for that day and the following day, Renee Seaman. Leill told them that he had been suspended by Respondent. The employees asked him why he was suspended and he said that he wasn't sure, but that he was going to have a hearing about it the following day. The employees were ''upset'' about this suspension, and the termination of another employee a few days earlier, and the employees said that it wasn't fair and that they should do something about it; a sick-out and a sit-in were specifically mentioned. The employees decided that they would have a sit-in at crew's quarters until they met with Lansing, and they informed the dispatcher of this.

Robert Taylor, an EMT employed by Respondent, who began working for Respondent 3 weeks prior to the incidents involved herein, was called as a witness by Respondent. He testified that on April 17 at about noon, while he and his partner, Joel Berry, were in their vehicle (''just wandering through the streets''), he overheard a discussion over the car radio that Respondent's vehicles have to allow transmissions between Respondent's facility and the vehicles. He heard Leill tell the dispatcher ''10-7,'' which is the code for back in service, but that he was unable to obtain a refusal.[3] The dispatcher instructed him to obtain a refusal and Leill answered that if the dispatcher wanted to obtain a refusal ''come get it yourself.'' Shortly thereafter, Taylor heard over the radio that Leill was told to return to the facility. Because Berry was a friend and roommate of Leill, Taylor and Berry returned to the facility as well. After a short time, Leill came from Lansing's office and told them that Lansing suspended him for failure to obtain a refusal. Taylor said that was crazy, that if you could be suspended for failure to obtain a refusal he didn't want to work there himself. Leill said that they should do something about it and Berry agreed. Leill said that he was going to the union hall ''to get the union guys involved.'' Sutphin and Seaman then came upstairs and Leill told them what happened. They then said that the wages weren't adequate, the equipment was in poor condition, and they were treated like kids by Alan O'Keefe, the then general manager. Taylor testified further, that at that time, the dispatcher, Susan Horvath,[4] assigned Sutphin and Seaman to a call involving a choking child at a local McDonald's restaurant. Sutphin said that she would not take the call and Leill told Horvath to transfer the call to Ace Ambulance Company. (This alleged refusal to handle a call will be discussed more fully, infra.) Lansing testified that on that morning O'Keefe informed him of an incident involving Leill that involved insubordination and a refusal to follow the directions of the dispatcher. O'Keefe recommended that Leill be disciplined. When Lansing checked Leill's records, he noted that Leill had previously been dismissed and was reinstated with a provision of probation for 1 year, and any incident, no matter the significance, was to be grounds for termination. Shortly thereafter, about 11 a.m., Leill came to Lansing's office and Lansing told him that he was dismissed. Leill ''became vocal'' and said that he was going to the union hall to complain about the dismissal. Lansing testified further that later that afternoon he heard a commotion down the hall involving Molly Chatlos, a supervisor, and two calls that she had difficulty covering. (This involves the alleged refusal by Sutphin to accept a call and, for the sake of simplicity, will be discussed in a separate section below.) Lansing then went to the crew's quarters to talk to the employees who were there; he asked what the problem was. Seaman and Sutphin did most of the talking for the employees; there were about four other employees attending, including Leill. The employees said they were upset with O'Keefe and dissatisfied with the progress of the union negotiations and wanted to talk to him, and nobody else. Lansing told them that he couldn't discuss the negotiations with them and that they had to go on calls. After some discussion, it was decided that they would meet again on the following Monday, April 24.

Sutphin testified that about 10 minutes after the sit-in at the crew's quarters began Lansing came to the crew's quarters and asked what was going on. Everybody spoke, asking why Leill was suspended and another employee was fired a few days earlier. Sutphin said that there was favoritism. Somebody said that morale was low and their equipment was poor. Lansing said that on the following day there would be a hearing on Leill's situation, and that when he found the time, he would set up another meeting with the employees. When Lansing finished speaking, the employees ended the sit-in and waited for calls.

[2] Alcover did not work on this day, so he did not participate in the events described below.

[3] When a team responds to a call and, after an examination, determines that the patient needs further care at, for example, a hospital, but the patient refuses to go, the employees are instructed to get the patient to sign a form stating, basically, that they were told that they needed further care, but refused it of their own accord.

[4] Subsequent to these events, O'Keefe and Horvath were married, ceased employment with Respondent, and relocated to Tennessee. Neither testified.

B. *Alleged Refusal to Accept a Call on April 17*[5]

As stated, supra, Taylor testified that during the discussion between Leill, Barry, Seaman, and himself, Horvath told Sutphin and Seaman that he had a call for them; it involved a child choking at McDonald's Restaurant. Sutphin said that she would not do the call. Leill told Horvath to transfer the call to Ace Ambulance instead. Lansing testified that in the afternoon, upon responding to a commotion in the hall, he heard Supervisor Molly Chatlos asking why they were refusing a call involving a choking child at McDonald's, and why this call was not being taken care of. While this was occurring, another call came to the facility involving a man with severe burns at the United Illuminating Company. Chatlos told Lansing that ''she was having problems with the crews getting out to the calls.'' Other than as stated above, Lansing had no direct contact with the alleged refusal to take a call. He testified that after the incident, he learned (presumably from Chatlos, who did not testify) that Sutphin and Seamen initially took the call and then they failed to continue with it. Lansing also testified that he never met with Sutphin and told her that she was fired for refusing to take the call.

In support of its position, Respondent introduced a number of exhibits in order to establish that Sutphin and Seaman refused a call on April 17. Initially received was a State of Connecticut regulation governing the operation of ambulance services. One of the ''Specifically Prohibited Acts'' is: ''No person engaged in the provision of emergency medical services shall commit an act which is detrimental to the safety, health or welfare of a patient or the general public.'' Also received were two provisions contained in Respondent's policy manual, which the employees are informed of at the time of employment. They state:

> Each ambulance shall at all times effectively respond to all calls they are dispatched to.
>
> Ambulances shall respond where assigned by the dispatcher. In most instances, the ambulance will respond in its district, but, if assigned out of district, there shall be no question of call acceptance or delay in response.

The next exhibit received was Respondent's log or ''blotter'' for April 17. This log covers all emergency calls for the day; there is a separate log for nonemergency assignments, such as is performed by Alcover. The log is filled out by the dispatcher, who lists all the relevant information for each emergency call received. At the end of each day, these logs are maintained in Respondent's files. The log indicates two calls were received at 2:17 p.m. The first one was for a call to McDonald's in downtown Bridgeport. The log indicates that the call was assigned to employee numbers 359 and 400—Tarrentino and Capparrell—and that they arrived at the scene at 2:31, cleared the scene at 2:35, and arrived at the hospital at 2:38. The next call in the log was also received at 2:17; all the information this log states for this call is that the call was received and, apparently, accepted at 2:18. The log also states ''man down'' at an address that Lansing testified is United Illuminating Company, and states ''Rolled to Ace.'' No employee identification numbers are listed for this call. The next two calls listed in the log (which were received at 3:04 and 3:38) were both assigned to and handled by employee numbers 269 and 375, Sutphin and Seaman. The next item received into evidence in this regard is a ''punch card,'' which is employed by Respondent for each call received. The one in question is stamped April 17 at 2:17 p.m. for ''notified'' and 2:18 p.m. for ''begin run.'' It is also stamped 2:25 p.m. for ''back in service.'' On the bottom of the card is handwritten: ''10 Henry St., Bpt. Rolled to Ace.'' At the very bottom of the card are boxes for the following: ''Vehicle #, Driver, Attend., Other, Dispat. #.'' The only writing in this portion of the card was in the Vehicle # box, but that was crossed out. Lansing testified that it says 713, which is the vehicle used that day by Sutphin and Seaman, but I do not see that as clearly as Lansing.

In addition to these records, Respondent's telephones and radio lines are recorded and Respondent introduced into evidence the recording of April 17. At that time, the tape was played several times and the only thing of relevance that I could understand was ''man down.'' I directed the reporting service to prepare a transcript of the tape, but the reporting service returned the tape with a notation: ''Tape cannot be transcribed.''

Sutphin testified that she never refused a call on the day in question, and the first she learned of this allegation was a few days later when the Union and Respondent: agreed that all employees except Sutphin, Seaman, and Alcover could return to work. At this time, she was told to write an incident report on the call and she said she didn't know what they were talking about. She testified that during the sit-in on April 17 she and Seaman did not receive any calls. During that period, however, Chatlos came into crew's quarters and said that she needed someone to respond to an ambulance call; Tarrentino and his partner took the call. Denise Koundry, who was employed, at the time, by Respondent as a dispatcher, testified that she was the dispatcher for the day shift on April 18 and Sutphin did not refuse any calls on that day. When Respondent presented its case and defended that the refusal occurred on April 17, that testimony was no longer relevant.

Lansing testified that within 4 or 5 months of the hearing herein, he fired two employees for failing to respond to a call. In the earlier one, an EMT was involved in a minor accident. After his vehicle was replaced, he was given another call which he refused to take. Lansing (who witnessed this refusal) told him he was violating alot of rules by refusing to take the call and gave him another opportunity to accept the call. When he refused to do so, he was fired. In the more recent incident, the dispatcher informed him that an employee had failed to take a call; that employee was terminated as well. Koundry testified to two situations in 1988 where employees who refused a call were not terminated by Respondent. One involved an employee named Cody, who had worked the midnight to 8 a.m. shift. At 8 a.m., they were very busy and Cody was asked to remain on duty past his usual quitting time. Sometime after 8 a.m., Koundry contacted Cody and assigned him a call which he refused, and he subsequently returned to the crew's quarters. Koundry informed Cody's supervisor and Lansing of the incident and subsequently saw that Cody continued his employment with Respondent. The other incident involved an employee named Tiber, then a paramedic. She assigned a call to him over the

[5] Prior to the hearing herein, in an affidavit submitted to the Labor Board on October 17 and at an unemployment hearing on September 15, Respondent had alleged that this refusal took place on April 18.

radio; he replied that he was eating lunch and would not take a call until he had completed his lunch. She reported this incident, as well, to Lansing. Tiber continued his employment with Respondent; at the time of the hearing herein, he was a supervisor.

### C. *Alcover Allegedly Stealing Time*

As stated, supra, Respondent's defense for refusing to allow Alcover to return to its employment is that he stole hours, i.e, he falsified the time on his timecard. Lansing testified that in about March he was made aware by some incident reports filed by employees[6] that Alcover was stealing time by punching in on his timecard at about 6 a.m., when he really didn't begin working until at least 8 a.m. These reports are dated March 17, 20, and 22. Lansing testified that he ''was very concerned because it was serious accusations and I wanted to be certain that they were accusing him of what was taking place.'' (Alcover was paid for all the time listed on these timecards.) He testified that in order to do this, he came in early one morning; he originally testified: ''I think it was the 24th,'' but, after some leading by his counsel, he testified that it was the Friday prior to the walkout, April 14. The dispatcher called him on that morning, a little before 7 a.m.; he had previously instructed her to call him if Alcover came in and then disappeared. He went to the facility, and looked at Alcover's time card which stated that he had punched in at 5:54 a.m.[7] Lansing then drove to Alcover's home and observed his car parked there. He waited in his car down the block from Alcover's residence and, about 7:45 a.m., he observed Alcover come out and drive to work at the facility. Alcover, at that time, was performing prescheduled nonemergency runs for Respondent and Lansing checked the log and Alcover's first run that day was at 10 a.m. (With the exception of, usually, one employee who reports to work at 6 a.m., the nonemergency drivers work from 8 a.m. to 4 p.m.) Lansing testified further that he did not terminate Alcover at that time because he wanted to see if this was an error by Alcover and he waited to see if Alcover signed this timecard. When Alcover signed this timecard on April 19 (Respondent's employees are required to sign their timecards when they receive their paychecks), Lansing determined that he would be terminated for this infraction. Lansing never spoke to Alcover about this situation. Alcover was the first employee disciplined for this kind of an offense.

Anthony Brown, who began his employ with Respondent in about December 1988, as a bus driver, became an EMT about a month later and was promoted to a supervisory position in about August or September, testified that in about the end of January, he was scheduled to do an early bus run beginning at 6 a.m. He punched in on his timecard and began to get his bus ready when he saw Alcover come in wearing ''civilian'' clothes and punch in on his timecard. Brown asked him what he was doing at the facility and Alcover said: ''Oh, I'll be back in about three hours,'' and left the facility in his own car. After that incident, whenever Brown had the 6 a.m. assignment (several times from January to April), he saw Alcover punch in wearing civilian clothes and leave in his own car. (The nonemergency work Alcover was assigned to at that time required the use of vehicles capable of handling wheelchairs.) About a week after the first incident, Brown informed O'Keefe of these incidents and he said that he would investigate it.

Alcover testified that sometime in March he arrived for work at 6 a.m. and punched in his timecard at that time. When he saw that another driver was present, he went home. When he returned at about 12:30 or 1 p.m., he realized that he had not clocked out on his timecard. He gave the card to the bookkeeper, explained the situation, and the card was corrected to show that he clocked out at 6 a.m. and he clocked in at around 1 p.m. About 5 minutes later, he saw Lansing who accused him of punching in and going home and he called Alcover an ''S.O.B.'' and said that he was stealing time and that he (Lansing) was watching him. Alcover showed Lansing the corrected timecard and Lansing walked away. To counter this testimony, Respondent moved into evidence (during its cross-examination of Alcover) his timecards for the weeks ending March 5, 19, and 26, and April 9 and 16, which show no corrections of time. On redirect examination of Alcover, the General Counsel moved into evidence his timecard for the week ending April 2. This card states that on Saturday, April 1, he initially clocked in at 7:04 a.m. The card also shows that he clocked out at 7:04 a.m. The clock-in is crossed out with what appears to be ''Didn't come in'' written over it. He later clocked in at 12:46 p.m. and worked 4 hours that day.

### D. *Events of April 18*

Sutphin worked her regular shift (8 a.m. to 4 p.m.) on April 18; Seaman was her partner again. Sometime that morning, Leill informed her, Seaman, and Berry that he was fired; she asked the reason, but he didn't give any. They then spoke about a possible job action. At that time, Sutphin and Seaman were assigned, and responded to, an emergency call. While at Bridgeport Hospital, they again met Leill who said that he had spoken with other crews about their earlier discussion and the consensus was to have a walkout. Sutphin said that she would go along with what the others wanted to do. She and Seaman then responded to a call; at the conclusion of the call, they returned to the facility where they again met Leill, who told them that the walkout was scheduled for 12 noon that day. Seaman and Sutphin then discussed whether another ambulance operation—Ace—would be able to cover the city of Bridgeport if Respondent's employees walked out. In Sutphin's presence, Seaman called Ace, identified herself and her employment with Respondent, and said that Respondent's employees were going to walk out at noon and she wanted to be sure that Ace could properly cover the city of Bridgeport. Sutphin and Seaman then went out on another call at the conclusion of which they requested permission to return to quarters (as it was almost 12), which request was granted. A number of crews returned to the facility at about the same time; they went into the facility, punched out on their timecards, and began walking in front of the facility. Sutphin estimated that about 20 employees participated in the walkout. (At that time, Respondent employed between 60 and 70 employees in this bargaining unit.)

[6] Because these incident reports are not ''typical'' business records of Respondent (such as payroll records) which would bring it within the business records exception to the hearsay rule, and because of the nature of these reports, they were received into evidence, but not for the truth of their contents.

[7] Alcover's timecard states that for April 14 he punched in at 5:54 a.m. and punched out at 4:50 p.m.

Alcover (who worked the 8 a.m. to 4 p.m. shift on April 18) was employed, at that time, driving the handicapped van, transporting individuals to hospitals, nursing homes, residences, and doctor's appointments. These calls were generally scheduled ahead of time and did not involve the dispatcher who assigned work to the EMTs. He testified that on April 18, at about 10 a.m., he met Leill at the facility. Leill expressed concern about the vehicles not being properly maintained and staffed, the low morale of the employees, and the pay at the facility. Leill told him that the employees were going to walk out at noon. At noon, Alcover joined the other employees who punched out and refused to work.

Lansing testified that on that morning the State Office of Emergency Services called the facility to say that they had learned that his employees were planning a walkout at noon that day. Shortly thereafter, O'Keefe informed him that he received a telephone call from Ace that Seaman had called them to say that there would be a walkout at noon, requesting that they cover the city. He then instructed dispatchers to call all supervisors and anybody else willing to work to be available for calls. He then called Joseph Roberto, secretary-treasurer of the Union, who stated that he knew nothing of the walkout. Later that afternoon, the Union sent a telegram to Respondent, inter alia, requesting ''the names and addresses of wildcat strikers so that Local 191 can advise such that a strike is not authorized and they should return to work.''

Later that afternoon, admittedly, Lansing threatened the employees congregating in front of the facility that they would be fired unless they returned to work. The accounts of this incident differ slightly. According to Sutphin, Lansing said: ''You have five minutes to come inside. If you don't come in, you're fired.'' Alcover testified that at about 4 p.m. Lansing approached them and said that they had 10 minutes to return to work or they would be terminated. Lansing testified that at about 5 p.m. he told the employees that if they did not return to work within 15 minutes, they would be terminated; those that did not report for work for their next scheduled shift were terminated.

### E. *Events of April 19 and Employees' Subsequent Attempts to Return to Work*

As they had done the prior day, the employees returned to the facility on April 19 and sat in front of the facility. On about April 20, the employees decided to attempt to return to work; Sutphin testified that at about 7:45 a.m. that day she and about eight other employees went into the facility to dispatch. O'Keefe told them to get out of the building or he would call the police; they were trespassing and they had been fired. The next morning, the same group of employees went into the facility again about the same time; O'Keefe told them the same thing he said the prior day and they all left.

Beginning on about April 24, the Union conducted a number of meetings with about 20 or 30 employees who were attempting to return to Respondent's employ. At the first meeting, Roberto said that even though they had engaged in a wildcat strike, he would arrange a meeting with Lansing to see if he could get them their jobs back. At the second meeting (possibly, the following day) Roberto said that Lansing had a list of employees whom he would not take back. The employees said that wasn't fair; it should be all or none returning. Roberto said that he would arrange a meeting with Lansing.

Two meetings took place, apparently, on April 24 and 25 at the Union's office; attending this meeting in addition to Lansing, Roberto, and Joe Bennetta, the Union's business agent, was Jonathan Best, who, at that time was employed by the city of Bridgeport as director of Transportation, director of the Office of Emergency Services, and director of the Office of Emergency Management. Best testified that he was directed by the Mayor of Bridgeport to arbitrate ''between Local 191 and Joseph Lansing in an attempt to get the people back to work.'' He attempted to bring the parties together in order to reach an agreement allowing the employees to return. He testified:

> The Union clearly felt that they were not responsible for this, that this was not something that they had sanctioned or been involved in. However, they did want to get their employees back to work. Mr. Lansing's feeling was that he had offered the employees the opportunity to come back to work on the previous day, had given them a time period—I don't remember if it was like fifteen minutes or a half hour to return to work and work out the problems or else he would terminate them. And his feeling was, I've terminated these people and I'm not going to take them back.

At the conclusion of these discussions, an agreement was reached. Respondent agreed to take back all those terminated except for Sutphin, Seaman, and Alcover. The Union agreed that the employees who returned would be on final probation, and if they violated any of Respondent's rules, they could be terminated for cause with no recourse by the Union. The Union and Respondent would sign a no-strike, no-lockout agreement and the Union would withdraw all charges before the Board with prejudice. Additionally, the Union agreed that they would not represent Leill regarding his discharge and that they would inform the affected employees of this agreement with Respondent. Immediately after the agreement was reached, Best, Roberto, and Bennetta met with the employees involved.

Best testified that Roberto spoke first and told the employees that they had reached an agreement with Lansing and that Best would explain it to them. He told the employees that the Union and Lansing had agreed that the employees that would be returning were returning on final probation for 6 months, meaning that any discipline during that period would result in termination without union representation. As regards Alcover, Sutphin, and Seaman, they would not be returning, but that he would ''evaluate the charges'' against them. If he found that the charges had merit, he would forward them to the state authorities and uphold their terminations. He told Alcover, Sutphin, and Seaman to submit to him incident reports on the allegations. He testified that he does not remember whether any of them asked him questions, or remarked, about this request. He never received incident reports from either Alcover, Sutphin, or Seaman, nor did he meet with them. He testified that he ''probably'' received a telephone call from Sutphin and either returned the call or attempted to do so, but never spoke to her. Best testified that partially due to his not receiving any incident reports and, possibly, learning that they had obtained employ-

ment elsewhere, his investigation went nowhere and no findings were made either way. It is admitted that Respondent never offered Alcover, Sutphin, or Seaman reinstatement.

Sutphin testified that at the final meeting with Best and the union representatives, Best read off the names of those who could go back and those who could not return—Sutphin, Seaman, and Alcover. Best said that Lansing claimed that she and Seaman had refused a call and that was the reason that he would not take them back. Best said that he would investigate the allegation and that he wanted the employees involved to file incident reports. Sutphin testified that she asked what call he was referring to and Best answered: ''You know what call I'm talking about.'' Sutphin said that she had no idea what call he was referring to and therefore she and Seaman couldn't be expected to write an incident report. She testified that after this meeting, she called Best's office every day for 2 weeks, but never spoke to him and never heard from him. Because she did not know what call was involved, she never prepared an incident report.

Alcover testified that Bennetta stated that Alcover would not be returning because Lansing had said that he stole 6 hours. Alcover testified that he couldn't understand what Bennetta was referring to, but did not question him about it. At the meeting, the employees were told that Alcover, Sutphin, and Seaman would not be taken back; Best said that he would investigate the situation involving them and get back to them, but he never did. Best never asked him to submit anything to him and he never attempted to contact Best about the investigation.

## III. ANALYSIS

The initial issue herein is whether Lansing's threat to the employees assembled in front of the facility that unless they returned to work in either 5, 10, or 15 minutes (depending on whose testimony you credit, although it makes no difference legally) they would be fired violates Section 8(a)(1) of the Act. However, because the legality of the threat depends on whether the employees' concerted activity is protected, the issue will be discussed at the conclusion of the discussion of the legality of the discharges of Sutphin and Alcover.

Counsel for the General Counsel alleges that Sutphin and Alcover were engaged in protected concerted activity on April 17 and 18, that they were fired because of this activity, and that the discharges therefore violate Section 8(a)(1) of the Act. Counsel for Respondent admits that Sutphin, Alcover, and the other employees were engaged in concerted activities during this period; however, he defends that because their actions were unsupported by, and in derogation of, their exclusive bargaining representative, they were not protected. Additionally, counsel for Respondent defends that even if their actions did constitute protected concerted activity, there is no violation because they were not fired for engaging in these activities; rather Sutphin was fired for refusing a call and Alcover was fired for stealing time.

The lead case in this area is *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). In that case, the Supreme Court found that an employer did not violate the Act by discharging employees for picketing its premises and urging a consumer boycott in order to force the employer to bargain directly with them regarding alleged employment discrimination. This activity lost its protection because these employees had a union representing them, the union and the employer had an existing contract with a no-strike, no-lockout clause and the union had already taken the employees' claim to arbitration. The Court stated that allowing such activity would result in ''competing claims,'' ''the potential for conflict,'' and ''conflicting demands.'' The Court stated:

> Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.

There is no easy or clear line dividing protected from unprotected activity in these kind of cases. However, the Board and Court cases contain certain ''catch'' phrases or words that are often helpful in delineating the boundaries of this dispute. ''Bargain directly with the employer'' (*Armco Steel Corp.*, 232 NLRB 696 fn. 5 (1977)); whether the employees' position ''was contrary to any bargaining position of the Union or that the employees otherwise acted in derogation of the Union's status as collective-bargaining representative'' (*Villa Care, Inc.*, 249 NLRB 705, 706 (1980)); that the position of the union ''was not inconsistent with the position expressed by the employees by walking out'' (*East Chicago Rehabilitation Center*, 259 NLRB 996 at 1000 (1982)); the employees ''clearly were acting concertedly in accord with the Union'' (*Architectural Research Corp.*, 267 NLRB 996 at 1005 (1983)); and whether the employees' actions ''[were] contrary to union objectives and policy'' (*River Oaks Nursing Home*, 275 NLRB 84 at 86 (1985)). In *Energy Coal Partnership*, 269 NLRB 770 (1984), the Board stated:

> Consequently, to extend the protection of Section 7 to dissident activity would undermine the statutory system of bargaining through an exclusive representative and place employers in the position of trying to placate self-designated minority groups, while at the same time attempting to meet the demands of the duly elected bargaining representative.
>
> This principle, however, is not absolute. The recognized exception is dissident activity which is in support of, and does not seek to usurp or replace, the certified bargaining representative.

In making this determination, the question is whether

> the action of the individuals or a small group [is] in criticism of, or opposition to, the policies and actions theretofore taken by the organization. Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such [diverse] dissident action is not protected. . . . If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected. . . . [*NLRB v. R.C. Can Co.*, 328 F.2d 974, 979 (5th Cir. 1964).]

Applying these standards to the events of April 17 and 18, I find that the employees' concerted activity of walking out was protected. Clearly, the precipitating factor in the walkout was Leill's discharge. Sutphin testified that when Leill informed the group of employees that he was suspended, they

said that it wasn't fair and it shouldn't be allowed to happen and that when they met with Lansing later that day, the employees spoke of the low morale, the favoritism, and poor equipment at the facility; at this meeting, Lansing never said that this was something the Union should he presenting. Lansing testified that when he met with the employees Seaman did most of the talking, but Sutphin spoke as well. They were upset with O'Keefe, and they ''expressed their dissatisfaction with the progress with the union. They wanted to take matters in their own hands.'' Lansing testified that he told the employees: ''I can't discuss anything regarding the union negotiations.'' Taylor testified that after Leill informed them of his suspension the employees said that something should be done about it. Sutphin and Seaman complained about the inadequate wages paid by Respondent, that the equipment they used was in poor condition, and that O'Keefe treated them like children. Of this testimony, I credit Sutphin. Lansing's testimony regarding the meeting seemed too ''manufactured'' to fit the law. I also found Taylor to be a credible witness and find that in discussing their unhappiness with the situation at the facility (after Leill's suspension), Sutphin and Seaman mentioned inadequate wages as well as the other items referred to. Although the walkout was not sanctioned by the Union and the Union referred to it in its April 18 telegram to Respondent as a ''wildcat strike,'' the employees' demands and statements during this period was not in derogation of the Union or contrary to, or inconsistent with, the Union's bargaining position. Counsel for Respondent in his brief argues that one reason the employees' action was not protected was because they wanted Lansing to negotiate directly with them rather than with the Union. The only evidence supporting this allegation is Lansing's discredited testimony. Rather, the evidence establishes that this spontaneous confrontation resulted in the employees expressing to Lansing a number of their ''gripes'' at working for Respondent, none of which were inconsistent with the Union's bargaining, nor meant as criticism of, or opposition to, the Union. Rather, it was criticism of Respondent's operation and the way they were being treated. I therefore find the employees' actions protected. Having so found, I find that Lansing's threat that unless the employees returned to work within 15 minutes they would be fired violates Section 8(a)(1) of the Act.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board set forth the rule it will henceforth apply in discrimination cases such as the instant matter:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Having found that the walkout was protected concerted activities, if Alcover and Sutphin were fired because of their participation in the walkout, their discharge violates Section 8(a)(1) of the Act. If they were discharged, as Respondent alleges, for stealing time and refusing a call, there is no violation.

Considering Alcover, initially, I find that the General Counsel has sustained his burden, but only barely. Alcover participated in the walkout with the others on April 18 and Respondent refused to reinstate him to employment, although Lansing never personally told him the reason for his discharge. I further find that although Respondent's case is far from ''airtight,'' considering the weakness of the General Counsel's case, Respondent presented enough evidence to rebut it. Lansing testified that he refused to take back Alcover because he stole time. The specific incident that Lansing testified he witnessed occurred on April 14 and Lansing's explanation for waiting until after the walkout to terminate him is that he wanted to see if Alcover signed his timecard, i.e., swearing to its contents, which he did on April 19. This is plausible; however, Lansing testified that in March he was first made aware of Alcover's alleged]y stealing time and Brown testified that in about January, he first witnessed Alcover punching in at 6 a.m. and then returning home, and reported these incidents to O'Keefe. Lansing never explained why he waited 1 to 3 months after he first learned of this practice before he fired him or why he never confronted Alcover with this evidence. Also unexplained is the correction made on Alcover's timecard for April 1. However, there are a number of factors contributing to my finding that Respondent has satisfied its burden of establishing that Alcover's participation on the walkout was not a factor in his termination. Chief among these is the fact that Alcover was not working on April 17 and did not take part in the walkout when it commenced on that day. When he did participate in the walkout on April 18, he assumed no leadership role; rather, he simply walked in front of the facility as did the other employees. The General Counsel never explains why Respondent would pick Alcover (in addition to Sutphin and Seaman) to refuse to take back, while taking back the other employees. He certainly didn't participate in the concerted activities to any greater extent than the others; if anything, he participated to a lesser extent. I believe that the April 1 incident where Lansing called Alcover an S.O.B. and said that he was stealing time and was watching him establishes that Lansing's animus toward Alcover began prior to April 17 and was due to this allegation that he was stealing time. That testimony together with Alcover's timecard for April 14, which shows that he clocked in at 5:54 a.m., together with Respondent's log which shows that his first run was at 10 a.m., as well as the testimony of Brown, whom I found to be an articulate and credible witness, convinces me that there was merit to Respondent's suspicions. I therefore recommend that this allegation be dismissed.

Counsel for the General Counsel has clearly satisfied its burden regarding Sutphin. The principal factor is timing; on April 17 and 18, Sutphin and Seaman were two of the leading forces behind the walkout. When Lansing spoke to the employees on April 17, Sutphin and Seaman did most of the talking and complaining. Within a few days (or a week at the most) Lansing had determined to take back all the strikers except for Sutphin, Seaman, and Alcover, and, even though she had been employed by Respondent for in excess of 2 years, Lansing never spoke to her to tell her why he would not allow her to return.

The issue then is: Has Respondent sustained its burden that Sutphin would have been discharged and denied reinstatement even in the absence of her participation in the

walkout? I find that it has not. From the time of the walkout, through the Regional Office's investigation of this matter and at the hearing herein, Respondent alleged that it did not reinstate Sutphin and Seaman along with the other employees because they refused a call. This is, of course, a serious offense, and, if true, would constitute valid grounds for discharge by Respondent. The issue is, however, has Respondent proven that such a refusal occurred and, if so, has Respondent proven by the probative evidence that it was Sutphin and Seaman who refused the call. I have numerous difficulties with Respondent's defense. Up through the first day of hearing herein, Respondent had alleged that this refusal occurred on April 18; in an affidavit submitted to Unemployment on September 15 and an affidavit submitted to the Board on October 7, Lansing stated that the refusal occurred on April 18. In addition, there is some confusion about which call she refused; Lansing's affidavit to the Board states that the call involved a choking child—this was the McDonald's call. Lansing testified that Chatlos told him that they had refused a call involving a choking child at McDonald's, and Taylor testified that he heard Horvath assign this McDonald's call to Sutphin and Seaman and he heard Sutphin say that she would not take the call. However, in the documents it placed into evidence, Respondent, apparently, attempted to establish that it was the United Illuminating call that Sutphin and Seaman had refused and that they had refused the call over the radio, rather than in person as Taylor testified. The log establishes that Tarrentino and Capparrell handled the McDonald's call; the log also establishes that at the same time Respondent received the United Illuminating call, but states only that the call was ''rolled to Ace.'' It does not identify Sutphin and Seaman as being assigned to the call, nor does it establish that the call was refused. In fact, the next two calls were assigned to, and handled by, Sutphin and Seaman. Also difficult to understand is why Lansing did not say something to Sutphin and Seaman at his meeting with the employees on April 17, which took place after the alleged refusal to take the call. Because of all these discrepancies, I credit the testimony of Sutphin over Lansing and Taylor, and find that Respondent has not established that Sutphin and Seaman refused a call on April 17. I therefore find that Respondent's discharge of (and refusal to reinstate) Sutphin violates Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. Respondent Bridgeport Ambulance Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, by threatening to discharge its employees if they did not agree to return to work, violated Section 8(a)(1) of the Act

3. Respondent violated Section 8(a)(1) by discharging Linda Sutphin on about April 18.

4. Respondent did not violate the Act as further alleged in the complaint.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, to wit, that Respondent offer Sutphin immediate reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and expunge from its files any reference to her termination. It is also recommended that Respondent be ordered to make Sutphin whole for any loss of earnings she sustained by reason of her discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

## ORDER

The Respondent, Bridgeport Ambulance Service, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge in retaliation for their protected concerted activities.

(b) Discharging its employees in retaliation for their protected activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Sutphin immediate reinstatement to her former position of employment or, if that position is no longer available, to a substantially similar position without prejudice to her seniority or other rights and make her whole for the loss she suffered as a result of the discrimination in the manner set forth above in the remedy section of this decision.

(b) Expunge from its files reference to the termination of Sutphin and notify her in writing that this has been done, and that the evidence of this unlawful activity will not be used as a basis for future actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay owed to Sutphin under the terms of this Order.

(d) Post at its Bridgeport, Connecticut facility copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed as it relates to the discharge of Alcover.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to discharge our employees for engaging in protected concerted activities.

WE WILL NOT discharge our employees in retaliation for their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL make whole Linda Sutphin, with interest, for any loss of earnings she may have suffered as a result of our discrimination against her, and WE WILL offer her full and immediate reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges.

WE WILL expunge from our files any reference to the termination of Sutphin, and notify her, in writing, that this has been done and that evidence of this unlawful action will not be used as a basis for future personal action against her.

BRIDGEPORT AMBULANCE SERVICE, INC.